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Supreme Court, U.S.
FILED
DEC 14 2004
OFFICE OF THE CLERK

No. 04-650

IN THE

Supreme Court of the United States

GARY L. KRETCHMER,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

Table of Cited Authorities ii

Counter-Statement of Case 1

A. Procedural History 1

B. Factual History 3

Reasons for Denying the Petition 6

A. The Pennsylvania Supreme Court Properly Dismissed Petitioner's Writ Of Habeas Corpus As Time-Barred And Waived, Pursuant To The Post Conviction Relief Act, 42 Pa. C.S.A. § 9501, *et seq.* 6

Conclusion 14

TABLE OF CITED AUTHORITIES

Page

Cases:

Commonwealth v. Albrecht, 720 A.2d 693 (1998) . . . 6

Commonwealth v. Alcorn, 703 A.2d 1054 (1997) . . 8

Commonwealth v. Baldwin, 789 A.2d 728 (2001) . . 8

Commonwealth v. Breakiron, 566 Pa. 323, 781 A.2d 94 (2001) 8

Commonwealth v. DiVentura, 734 A.2d 397 (Pa. Super. 1999) 7

Commonwealth v. Fahy, 558 Pa. 313, 737 A.2d 214 (1999) 7, 8, 9, 11

Commonwealth v. Henry, 706 A.2d 313 (Pa. 1997) 7

Commonwealth v. Johnson, 732 A.2d 639 (1999) . . 10, 11

Commonwealth v. Johnson, 841 A.2d 136 (Pa. Super. 2003) 7

Commonwealth v. Kutnyak, 781 A.2d 1259 (2001) 8

Commonwealth v. Lark, 746 A.2d 585 (2000) 8

Cited Authorities

	Page
Commonwealth v. Peterkin, 722 A.2d 638 (1998) ...	8
Commonwealth v. Tedford, 781 A.2d 1167 (Pa. 2001)	7
Herrera v. Colllins, 506 U.S. 390 (1993)	12
Schlup v. Delo, 513 U.S. 298 (1195)	11, 12
Statutes:	
42 Pa. C.S.A. § 9501	6
42 Pa. C.S.A. § 9542	6, 9
42 Pa. C.S.A. § 9543(a)(2)(i)	8, 13
42 Pa.C.S.A. § 9544(b)	10
42 Pa .C.S.A. § 9545(b)(1)	6-7, 8, 9

The Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari seeking review of the judgment of the Supreme Court of Pennsylvania dated August 16, 2004.

COUNTER-STATEMENT OF CASE

A. Procedural History

On November 22, 1988, following trial by jury, Petitioner was convicted of First Degree Murder and Burglary. On May 26, 1989, Petitioner's post-verdict motions were denied, and on June 30, 1989, Petitioner was concurrently sentenced to life imprisonment for First Degree Murder and not less than ten nor more than twenty years for Burglary.

On May 8, 1990, the Pennsylvania Superior Court denied Petitioner's direct appeal. The Pennsylvania Supreme Court denied allocatur on April 30, 1991. Petitioner did not seek a writ of certiorari to the United States Supreme Court.

In October 1993, Petitioner filed his first petition for post-conviction collateral relief. On September 5, 1994, the trial court denied Petitioner's request for relief. The Superior Court denied Petitioner's appeal of the denial of his PCRA on December 29, 1995. On March 27, 1997, the Pennsylvania Supreme Court dismissed the petition for allowance of appeal.

Petitioner's collateral challenges in Federal Court were likewise denied in February 1999 through April 2001.

On January 23, 2002, Petitioner filed a petition with the trial court seeking an Order to compel the Commonwealth

to provide a copy of his audio taped interview by the San Diego Police Department. Prior to any Court action, the Commonwealth forwarded a copy of the audiotape to Petitioner's counsel on February 4, 2002. The Commonwealth previously provided Petitioner with the contents of the audio taped interview during discovery. The hearing subsequently scheduled on Petitioner's motion was dismissed by the trial court because Petitioner's counsel failed to appear and the issue raised by Petitioner was moot.

On April 25, 2002, Petitioner filed his first petition with the trial court allegedly seeking habeas corpus relief, claiming alleged discrepancies between the contents of the aforementioned audiotape and testimony of the San Diego police officer at trial, and implying ineffective assistance of all previous counsel for failure to secure a copy of same audiotape. The trial court, treating the petition as a Post Conviction Relief Act petition, dismissed the petition without a hearing on August 7, 2002.

Petitioner filed a second petition requesting habeas corpus relief on September 12, 2002. In this petition, Petitioner alleged constitutional violations involving discovery violations and/or prosecutorial misconduct concerning the aforesaid audio taped interview. The trial court denied this petition, also treated as a Post Conviction Relief Act petition, on October 1, 2002. The Superior Court denied Petitioner's appeal and Petitioner's application for re-argument on June 5, 2003. The Pennsylvania Supreme Court denied Petitioner's petition for allowance of appeal on February 17, 2004. On August 16, 2004, the Pennsylvania Supreme Court also denied Petitioner's Petition for Writ of Habeas Corpus.

The instant *pro se* petition for writ of Certiorari to the United States Supreme Court followed.

B. Factual History

At trial, the evidence established that on October 6, 1981 Scott Rosenblum was found dead in his apartment at Number 273 Salem Harbour Apartments, Bensalem Township, Bucks County, Pennsylvania. Gary Kretchmar, the Petitioner, and the victim's brother in-law discovered the victim lying face down in his living room.

Petitioner and his brother-in-law discovered the body when the victim's estranged wife and sister became concerned after not hearing from the victim. N.T. 11/16/88 at 58. After attempting to contact the victim several times without success, the victim's wife and sister called Petitioner and asked him to investigate. N.T. 11/16/88 at 58-59. At that time, Petitioner was the victim's neighbor and had a key to his apartment. N.T. 11/16/88 at 59, 61. However, Petitioner refused to check on the victim. N.T. 11/16/88 at 57-61. Eventually, the victim's brother-in-law approached Petitioner and requested access to the victim's apartment. N.T. 11/16/88 at 70-73. Petitioner conceded, and at approximately 1:30 to 2:00 p.m., both entered the victim's apartment, where they discovered the victim's body lying face down in the living room. N.T. 11/16/88 at 70-74. When police later arrived at 2:30 p.m., they did not discover any signs of forced entry. N.T. 11/16/88 at 51.

On October 6, 1981 at approximately 1:00 to 1:30 a.m., Gertrude Kalinowski, the victim's neighbor, heard the outside door to the corridor leading to the rear entrance of both her and the victim's apartments open and quickly shut. N.T. 11/17/88 at 152-54. Kalinowski also heard someone running and three gunshots. N.T. 11/17/88 at 152-54.

An autopsy revealed that the victim had been shot three times. The victim was first shot in his back; the bullet hit the spinal cord and lodged in the lung. N.T. 11/16/88 at 133-34. The second shot went into the victim's chest, where the bullet broke the sternum and a rib, and pierced the heart. N.T. 11/17/88 at 133. The final shot, which was not visible on scene due to the position of the victim's head, entered the victim's left ear and entered the brain. N.T. 11/16/88 at 134. All three bullets remained lodged in the victim's body and were recovered during the autopsy. N.T. 11/16/88 at 133-34. According to the pathologist, any one of the shots could have caused the victim's death. N.T. 11/17/88 at 137.

When questioned about his whereabouts on October 5, 1981, Petitioner told police he attended a Philadelphia Eagles football game with Eric Price, a long-time friend. N.T. 11/16/88 at 52-53. Originally, Price corroborated this story at Petitioner's request. N.T. 11/16/88 at 94. However, when interviewed subsequently, Price admitted that Petitioner never attended the game. N.T. 11/16/88 at 85. Price did attend the game, and at approximately 2:00 a.m. returned home, where he received a phone call from Petitioner. N.T. 11/16/88 at 88. Petitioner apologized for not attending the game and at the end of the conversation, twelve hours before the victim's body was discovered, told Price that someone had been murdered and he would explain everything in detail later. N.T. 11/16/88 at 87-90. At approximately 6:00 a.m. that same morning, Petitioner told Price by telephone that the victim had been killed. N.T. 11/16/88 at 90-91. He further claimed the police had retrieved the body and were questioning witnesses about the murder, which they believed was committed by organized crime. N.T. 11/16/88 at 90-91. At approximately 1:30 to 2:00 p.m., Petitioner again contacted Price. N.T. 11/16/88 at 91. Petitioner stated he told

police he was with Price the previous night, and asked Price to corroborate this alibi. N.T. 11/16/88 at 91-92.

Police officers conducted a search of the victim's apartment and uncovered a full box of .22 caliber bullets. N.T. 11/16/88 at 43; 11/17/88 at 253-54. However, police did not locate the victim's .22 caliber bolt-action rifle and scope, which he kept underneath his bed. N.T. 11/16/88 at 253-54. Additionally, police were unable to locate the victim's briefcase, which contained cash proceeds from the victim's business. N.T. 11/21/88 at 188-92, 253-54.

The Federal Bureau of Investigation's laboratory in Washington D.C. analyzed the bullets extracted from the victim's body, three empty casings, and the box of bullets found at the scene. N.T. 11/21/88 at 21-25. The casings and projectiles were fired from the same .22 caliber weapon. N.T. 11/21/88 at 17-25. Furthermore, the projectiles were produced by the same manufacturer and in the same general batch as the live rounds found in the box at the scene. N.T. 11/21/88 at 17-25.

Following the issuing of the Grand Jury Presentment and the filing of the Criminal Complaint, the Commonwealth discovered that Petitioner fled the area. Petitioner was not apprehended until July 1988, in San Diego, California. When interviewed by the San Diego Police Department regarding the murder, Petitioner claimed he did not know the victim's last name and discovered the body with the victim's brother-in-law. Robert Tyrone, a detective with the San Diego Police Department, testified that Petitioner told him that when he first saw the body, the victim appeared to be shot in the head. N.T. 11/17/88 at 216-18.

REASONS FOR DENYING THE PETITION

A. The Pennsylvania Supreme Court Properly Dismissed Petitioner's Writ Of Habeas Corpus As Time-Barred And Waived, Pursuant To The Post Conviction Relief Act, 42 Pa. C.S.A. § 9501, *et seq.*

Petitioner claims in his petition for writ of habeas corpus before this Honorable Court that the Commonwealth committed a discovery violation by "withholding" the taped interview of Petitioner by the San Diego Police Department conducted in July of 1988. This claim, implicating discovery and/or constitutional violations, and therefore the truth-determining process at trial, is subsumed within the Post Conviction Relief Act, 42 Pa. C.S.A. § 9501, *et seq.* (PCRA), time-barred, and has been waived. Moreover, Petitioner's claim is unsupported by the record and without merit. Therefore, the Pennsylvania Supreme Court properly denied Petitioner's writ of habeas corpus.

Allegations of prosecutorial misconduct are properly asserted on direct appeal; if a defendant fails to allege prosecutorial misconduct on direct appeal, then those claims are waived. However, "any meritorious claims which escape counsel's recognition on direct appeal can then be raised on grounds of counsel's ineffectiveness" in a PCRA petition. *Commonwealth v. Albrecht*, 720 A.2d 693, 700 (1998). The PCRA is "the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies . . . including habeas corpus and corum nobis." 42 Pa. C.S.A. § 9542.

A petitioner must file a PCRA petition within one year from the date his judgment becomes final. 42 Pa. C.S.A.

§ 9545(b)(1). "A judgment of sentence becomes final once an appellant's means of direct review of a conviction, including discretionary review in the Supreme Court of the United States or the Supreme Court of Pennsylvania, have concluded or the time limits for seeking a direct appeal have expired." *Commonwealth v. Tedford*, 781 A.2d 1167, 1170-71 (Pa. 2001). The only exceptions to the one-year filing requirement involve "government interference, after-discovered facts or evidence and an-after recognized constitutional right." *Commonwealth v. Johnson*, 841 A.2d 136, 139 (Pa. Super. 2003) (citing 42 Pa. C.S.A. § 9545(b)(1)(i)(ii)(iii)). To qualify for any of these exceptions, a petitioner must "not only satisfy the substantive requirements of the savings provision, but must also file a petition invoking such exception within 60 days of the date the claim could have been filed." *Commonwealth v. Fahy*, 737 A.2d 214, 220 (Pa. 1999). The after-discovered evidence exception requires a petitioner to show that the evidence:

> (1) has been discovered after the trial and could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative, (3) will not be used solely for impeachment purposes; and (4) is of such a nature and character that a different verdict will likely result if a new trial is granted.

Commonwealth v. Henry, 706 A.2d 313, 321 (Pa. 1997).

In contrast, habeas corpus is an extraordinary remedy that "may only be invoked when other remedies in the ordinary course have been exhausted or are not available." *Commonwealth v. DiVentura*, 734 A.2d 397, 398 (Pa. Super. 1999).

> If a petitioner is in custody by virtue of a judgment of sentence of a court of competent jurisdiction, the writ generally will not lie. Pennsylvania law explicitly states that in cases where a person has been restrained by virtue of sentence after conviction for a criminal offense, the writ of habeas corpus shall not be available if a remedy may be had by post conviction hearing proceedings authorized by law. *Issues are not cognizable under the statutory remedy of habeas corpus if they could have been considered and corrected in the regular course of appellate review or by post-conviction proceedings authorized by law.*

Id.

Therefore, the writ of habeas corpus continues to exist as an independent basis for relief only in cases in which there is no remedy under the PCRA. *Fahy*, 737 A.2d at 214.

Petitioner's claims of violations of the constitution and of the law in his petitions for habeas corpus relief, and the alleged implication of the truth-determining process, if pled and proven by a preponderance of the evidence, are claims that would be cognizable under the PCRA. *See* 42 Pa. C.S.A. § 9543(a)(2)(i). Petitioner previously raised these issues in two petitions that were dismissed due to un-timeliness pursuant to the jurisdictional requirements of the PCRA. 42 Pa. C.S.A. § 9545(b); *see also Commonwealth v. Breakiron*, 781 A.2d 94 (2001); *Commonwealth v. Baldwin*, 789 A.2d 728 (2001); *Commonwealth v. Lark*, 746 A.2d 585 (2000); *Fahy*, 737 A.2d 214; *Commonwealth v. Peterkin*, 722 A.2d 638 (1998); *Commonwealth v. Kutnyak*, 781 A.2d 1259 (2001); *Commonwealth v. Alcorn*, 703 A.2d 1054 (1997), *allocatur*

denied. Petitioner's judgment of sentence became final on July 29, 1991, upon the expiration of the ninety day period for seeking review to the U.S. Supreme Court of the Pennsylvania Supreme Court's April 30, 1991 Order denying allocatur. *See Fahy*, 737 A.2d at 218. Since the date of final judgment was July 29, 1991, and this petition was filed eleven years later, it is obviously beyond the PCRA'S one-year time limitation. *See id.*. Moreover, Petitioner's counsel conceded in his petition for writ of habeas corpus filed in the trial court on April 25, 2002 that "[Petitioner] is jurisdictionally out of time for filing under the Post Conviction Relief Act." Petition for Writ of Habeas Corpus, CV NO. 0202731-276, Paragraph 14.

Furthermore, the untimely filing of Petitioner's petition does not fall within the statutory exceptions found in 42 Pa. C.S.A. § 9542(b). Petitioner attempts to claim that the audio tape in question is after discovered evidence. However, Petitioner has not claimed and cannot claim that the facts and averments underlying his claims were unknown to him and could not have been ascertained through the exercise of reasonable diligence. 42 Pa. C.S.A. § 9545(b)(1)(ii). The existence of the taped interview was provided to Petitioner prior to trial in the discoverable materials. *See* Discoverable Materials, Additional Discovery dated September 20, 1988: Report of Detective Kenneth Hopkins, Bensalem Township Police Department, dated July 22, 1988; Report of V. Colvin, San Diego Police Department, dated July 14, 1988; Report of R. Tryon, San Diego Police Department, dated July 15, 1988. In addition, Petitioner was obviously present during that taped interview; therefore, he was aware of the tape's existence, as well as the statements he made to the San Diego Police. The audiotape simply corroborated the testimony of Detective Tyron. At trial, Detective Tyron testified the Petitioner stated that when he first saw the

body, it appeared the victim was shot in head. N.T. 11/17/88 at 218. The verbatim, taped conversation was:

> Detective Tyron: "What did it appear [the victim] died of?"
>
> Petitioner: "Shot in the head."

The evidentiary relevance of Detective Tyron's testimony regarding Petitioner's statement to him and Petitioner's actual words in the taped interview, taken in context, are the same. Petitioner could not have known that the victim was shot in the head based on his discovery of the body, due to the position of the body at the crime scene. Playing the tape at trial would not have resulted in a different verdict. Therefore, the after discovered evidence exception to the PCRA's one-year filing requirement does not apply.

Moreover, under the PCRA, a claim is waived if Petitioner could have raised it before trial, at trial, on direct appeal, or in a prior state post-conviction proceeding, but failed to do so. 42 Pa. C.S.A. § 9544(b). Petitioner, who was obviously present at the taped interview, and therefore aware of the tape's existence and the statements he made during the interview, waited over thirteen years to allege a discovery violation and contest Detective Tryon's testimony. Petitioner's failure to raise the instant claims regarding the taped interview pre-trial, at trial, on direct appeal, or in his first PCRA challenge constitutes a waiver of these claims.

The fact that Petitioner's claims, which may have been cognizable under the PCRA, are precluded by the PCRA's timeliness requirements and waived does not entitle Petitioner to habeas corpus relief. *Commonwealth v. Johnson*,

732 A.2d 639 (1999). "Simply because a petition is not considered because of previous litigation or waiver does not alter the PCRA's coverage of such claims or make habeas corpus an alternative basis for relief." *Fahy*, 737 A.2d at 224.

In addition, Petitioner's claim that the Commonwealth committed a discovery violation by "withholding" the taped interview of Petitioner by the San Diego Police has no merit. There is no evidence of record that any information was withheld. Petitioner's self-serving claim that he could have learned that the victim was shot in the head through newspaper accounts is wholly unsupported by the record. Nowhere in the taped interview does Petitioner ever say that he read in the newspapers that the victim was shot in the head. No evidence was introduced at trial that Petitioner learned that the victim was shot in the head through newspaper accounts, nor did trial counsel have any evidence suggesting the same. In fact, Petitioner denied to trial counsel that he even made such a statement. N.T. 6/24/94 at 38.

Petitioner further alleges that if his constitutional claim is time-barred under the PCRA, then he is still entitled to relief under the fundamental miscarriage of justice exception articulated in *Schlup v. Delo*, 513 U.S. 298 (1195). In *Schlup*, the Petitioner filed a federal habeas corpus petition claiming he was actually innocent. 513 U.S. at 307. Petitioner's constitutional claim of innocence was procedural, based on his contention that counsel was ineffective and the prosecution withheld evidence. 513 U.S. at 314. The fundamental miscarriage of justice exception is "[t]he doctrine allowing a federal court in a habeas corpus proceeding to address a claim of constitutional error that, although ordinarily unreviewable, is subject to review because of a state-court procedural default that rendered the

proceedings basically unfair." Black's Law Dictionary 683 (8th ed. 2004). Under the fundamental miscarriage of justice exception, if a petitioner makes a proper showing of actual innocence, then his time-barred constitutional claim may be considered on the merits. *See Herrera v. Colllins*, 506 U.S. 390, 404 (1993). However, the application of this exception should only occur in the "extraordinary case . . . to those who [are] truly deserving." *Schlup*, 513 U.S. at 321. In *Schlup*, this Honorable Court stated that "habeas corpus petitions that advance a substantial claim of actual innocence are extremely rare." 513 U.S. at 321. To maintain such a claim, a petitioner must support his allegations of constitutional error with new, reliable evidence that was not presented at trial. 513 U.S. at 324.

First, it is important to note that in *Schlup*, the petitioner filed a federal writ of habeas corpus. Petitioner's case can be distinguished from *Schlup* because Petitioner filed a state writ of habeas corpus. However, even if the principles of *Schlup* and fundamental miscarriage of justice exception are applied to the present case, Petitioner is still not entitled to relief. Here, the after-discovered evidence is an audiotape of an interview with the Petitioner. Petitioner was obviously present during that taped interview; therefore, he was aware of the tape's existence, as well as the statements he made to the San Diego Police. The Commonwealth turned over the contents of the tape to Petitioner during discovery, prior to trial. Furthermore, the tape itself does not provide any new evidence. Moreover, unlike in *Schlup*, the record contains evidence, other than Detective Tyron's testimony, which establishes Petitioner's guilt. Therefore, Petitioner has failed to advance a substantial claim of actual innocence and does not qualify for relief under the fundamental miscarriage of justice exception enunciated in *Schlup*.

Finally, Petitioner contends that "it is impossible to find a state avenue to process a constitutional violation claim during collateral review of a criminal conviction." Petition for Writ of Certiorari at 21. During collateral review, constitutional violations are properly addressed through the PCRA. 42 Pa. C.S.A. § 9543(a)(2)(i). Specifically, the PCRA provides that a petitioner may be eligible for relief if he pleads and proves by a preponderance of the evidence "a violation of the Constitution of this Commonwealth or the Constitution or laws of the United States, which so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa. C.S.A. § 9543(a)(2)(i). Petitioner cannot obtain relief because his petition was waived and not timely, not because state avenues do not exist to process constitutional claims during collateral review.

Therefore, Petitioner is not entitled to relief.

CONCLUSION

Wherefore, for the aforementioned reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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